FOR ARGUMENT

Supreme Court, U.S.
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No. 87-6997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE JOHN CARELLA,

Appellant,

v.

STATE OF CALIFORNIA,

Appellee.

On Appeal From The Appellate Department
Of The Superior Court Of California,
County Of Los Angeles

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

Although urging the Court to spare the challenged statutes from facial invalidation, appellee candidly acknowledges that the instructions given to appellant's jury deprived him of due process of law. On that basis, appellee concedes that the judgment below must be reversed and requests that that case be remanded for a determination of whether the error was harmless. Brief of Appellee at 31 & 37.

The State's confession of error substantially narrows the focus of this appeal. As we explain in the sections that

follow, we continue to believe that Cal. Penal Code § 484 (b) and Cal. Vehicle Code § 10855, as authoritatively construed by the courts below, are unconstitutional in all their applications. We acknowledge, however, that the State's concession makes it unnecessary for the Court to address those broader issues. In light of that concession, the only remaining questions are whether the conceded constitutional violation is subject to harmless error analysis and, if so, whether that inquiry should be undertaken in the first instance by the court below. Although appellant does not oppose the State's request for a remand on the harmless-error issues, he continues to believe that the considerations that ordinarily militate in favor of a remand are largely absent in the circumstances of this case. *See* Brief of Appellant (hereinafter "Opening Br.") at 38 n.37.

I. BECAUSE THE TRIAL COURT'S INSTRUCTIONS PURSUANT TO VEHICLE CODE § 10855 AND PENAL CODE § 484(b) COULD HAVE BEEN REASONABLY CONSTRUED AS DIRECTING A CONCLUSIVE PRESUMPTION ON ONE OR MORE ELEMENTS OF THE OFFENSE, APPELLANT WAS DENIED DUE PROCESS OF LAW.

As appellee is "compelled to concede," the trial court's instructions pursuant to Vehicle Code § 10855 and Penal Code § 484(b) could have been reasonably understood by appellant's jury as directing a mandatory conclusive presumption on one or more elements of the charged offense. Br. of Appellee at 10. *See also id.* at 31 ("[B]oth instructions could reasonably be taken as directing the jury to find the presumed fact upon proof of the predicate facts.") Regardless of how the presumptions are characterized under State law, appellee therefore acknowledges, the manner in which they were presented "offend due process of law." *Id.* at 4. *See also, Sandstrom* v. *Montana*, 442

U.S. 510, 516-17 (1979). Because, as appellee has also conceded, "other instructions did not cure the error," the judgment below must be reversed. Br. of Appellee at 31.[1]

II. ALTHOUGH THE COURT NEED NOT ADDRESS THE ISSUE, APPELLEE'S DEFENSE OF THE FACIAL VALIDITY OF THE STATUTORY PRESUMPTIONS IS WITHOUT MERIT.

Because appellee's concession pretermits any need to consider the facial validity of Vehicle Code § 10855 and Penal Code § 484(b), we address that issue only briefly. Notwithstanding the clarity of the statutory language and the contrary construction of the courts below, appellee contends *first* that both provisions should be interpreted as authorizing a permissive inference rather than a concededly invalid mandatory presumption. *Sec-*

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[1] Disagreeing with appellee, *Amicus Curiae* American Rental Association attempts to defend the instructions on several grounds, all of which are unavailing. The suggestion that a general "reasonable doubt" instruction cures a *Sandstrom* violation has been specifically rejected by the Court on two separate occasions. Opening Br. at 14 n.14. Nor is it of any significance whatever that the trial court included a "mistake of fact" instruction in its charge. Self evidently, telling the jury that a mistake of fact would vitiate intent does not excuse an instruction that directs the jury to conclusively presume intent in the first place. (It is, of course, entirely possible to lack the requisite intent for grand theft even if one is not operating under a mistake of fact). Moreover, § 10855 generates a presumption with respect to *every* element of the offense. Thus, even assuming that intent remained a triable issue in light of the mistake of fact instruction, that conclusion would not save the statute. Finally, the suggestion that a presumption is impermissible only if proof of the *actus reus* generates an inference of *mens rea* is wholly inconsistent with the Court's reasoning in *Sandstrom* and *Francis*. In any event, because § 10855 operates in precisely that fashion, the distinction *Amicus* purports to be drawing is ephemeral.

ond, although recognizing (1) that appellant's jury was repeatedly instructed that embezzlement requires a specific intent to deprive the owner of permanent possession, (2) that the California pattern jury instructions, which were reissued as recently as 1988, endorse that interpretation of state law, and (3) that that interpretation is reflected in California decisional law, appellee relies on another line of cases to suggest that an intent to deprive the owner of temporary possession is sufficient to sustain a conviction for embezzlement. On that basis, it contends that the relationship between the predicate and elemental facts set out in the challenged presumptions are sufficiently rational to satisfy Due Process. Neither of appellee's contentions withstands even the most minimal scrutiny.

A. For Purposes Of This Appeal, The Decision Below Represents The Authoritative Interpretation Of State Law.

Appellee concedes that, as construed by the courts below, the challenged presumptions are unconstitutional on their face. Br. of Appellee at 10 & 16.[2] Notwithstand-

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[2] According to appellee, the defect in the statutes, as construed by the lower courts, is that the jury is never informed of the mechanics of the presumption—*i.e.*, that it drops out of the case if the jury finds some evidence in support of the non-existence of the presumed fact. If the trial judge makes that determination unilaterally—without ever instructing the jury that the presumption is "discharged" upon the introduction of some contrary evidence—appellee concedes that the scheme violates the rule of *Sandstrom* v. *Montana*, *supra*. Br. of Appellee at 10. Appellee further recognizes that the constitutionality of a presumption that shifts the burden of production is "an open question" even if the jury itself determines whether sufficient evidence has been adduced to cause the presumption to disappear from the case. *Id.* at 12. As is discussed in our opening brief at pp. 17-30, we believe that the burden shifting presumptions at issue in this appeal are unconstitutional regardless of whether the jury is informed of the mechanics of the procedural device.

ing that concession, appellee suggests that the statutes should be upheld in light of another California decision, which suggests that impermissible mandatory presumptions should be "converted" into permissive inferences in order to assure their constitutionality. Br. of Appellee at 14-17. *See People* v. *Roder*, 33 Cal.3d 491, 658 P.2d 1302 (1983). Because, in appellee's view, the California Supreme Court would "pare down" the challenged statutes "to constitutionally permissible limits," the contrary interpretation by the court below should not be the basis for invalidating either provision. 33 Cal.3d at 505-06, 658 P.2d at 1312.

The suggestion that this Court should, in effect, disregard the lower court's construction of state law is untenable. As the Court reaffirmed as recently as last term, even when the decision under review is that of an intermediate appellate court, this Court is simply "not at liberty" to depart from a state court's "considered judgment" concerning the meaning of State law. *Hicks ex rel. Feiock* v. *Feiock*, 108 S.Ct. 1423, 1428 & 1428 n.3 (1988) (quoting *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 (1940)). Invocation of that unvarying rule is particularly appropriate in the circumstances of this case.[3] Because the decision in *Roder* involved neither of the statutory provisions at issue in this appeal, the opinion's observation about the status of mandatory presumptions generally was the purest form of dictum. Thus, "[e]ven though it is arguable that the Supreme Court of [California] will at some later time modify the rule of [this] case,

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[3] In diversity cases, federal courts will occasionally speculate about how the highest appellate court in the state would resolve an open issue of state law. But appellee cites no federal-question cases, and we have found none, in which this Court second guessed an interpretation of state law by an intermediate state court.

whether that will ever happen remains a matter of conjecture." *Id.* at 1428 n.3. In that circumstance, as the Court again admonished in *Hicks*, the law of the intermediate appellate court must be accepted as authoritative.

In short, for purposes of this appeal, the law of California is the law that was announced and applied in the courts below. As we argue in our opening brief—and as appellee now concedes—Penal Code § 484(b) and Vehicle Code § 10855, as authoritatively construed by both the trial court and the Appellate Department, "offend due process of law." Br. of Appellee at 4.

B. The Absence Of A Rational Connection Between The Predicate And Presumed Facts Renders Vehicle Code § 10855 Independently Unconstitutional.

For similar reasons, appellee's defense of the rationality of the challenged presumptions is unavailing. Effectively conceding the point, the State makes no effort to defend the proposition that willful retention of a rental car five days beyond the due date "more likely than not" implies an intent to keep it *permanently*. *Leary* v. *United States*, 395 U.S. 6, 36 (1969). Unable to make that argument, it contends instead that the trial court "committed error" when it instructed the jury that all forms of grand theft, including embezzlement, require a specific intent to deprive the owner of permanent possession. Br. of Appellee at 25. Since embezzlement only requires an intent to keep the property temporarily, it suggests, the connection between the predicate and presumed facts set out in § 10855 is sufficiently rational to satisfy due process.

Appellee's argument, once again, reduces to the suggestion that the decision below should not be judged on its

own terms because it represents a misapplication of state law. Not once, but *four* times, the trial court instructed the jury that "the crime of grand theft"—which, the jury was further charged, subsumes the crime of embezzlement—requires "a specific intent to permanently deprive the owner of his property." J.A. 8; *see also*, J.A. 6 & 10. Those instructions were taken from California's pattern jury instructions, which are approved by an official committee of the Superior Court and are intended to accurately represent the current state of the law in California. Presumably for that reason, the court's charge elicited no objection from the prosecution, either at trial or on appeal.[4] In these circumstances, it is simply not open to appellee to now urge an interpretation of state law diametrically at odds with that of the lower courts. *See infra* pp. 5-6.

Moreover, while appellant recognizes that it is not the province of this Court to delve into the nuances of California law, the interpretation now advanced by the State is nowhere near as unambiguous as it suggests. Appellee correctly identifies a line of cases holding that an otherwise valid conviction for embezzlement will be sustained even if the defendant intended to restore the converted funds at some unspecified future date. At the same time, numerous other decisions hold unequivocally that "[i]f it appears that property has been taken with the intent to make but a temporary . . . use of the property, then a conviction of grand theft may not occur." *People* v. *Renteria*, 60 Cal. App. 2d 463, 141 P.2d 37, 42 (2d Dist.

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[4] See Br. of Appellee at 22 n.21 & 25 n.25 (suggesting that the pattern jury instructions should be "revised" by the official committee that reviews them in order to reflect the view of the law now advanced by appellee).

1943).[5] That generic requirement, an equal number of decisions suggest, holds true regardless of the form of theft alleged in the complaint. *See, e.g.*, *People* v. *Pater*, 267 Cal. App.2d 921, 73 Cal. Rptr. 823, 825 (3d Dist. 1969) (embezzlement requires intent to permanently deprive owner of property); *People* v. *Starkey*, 234 Cal App.2d 822, 44 Cal. Rptr. 738, 742 (2d Dist. 1965) (assuming same in rental car case); *People* v. *Carr*, 229 Cal. App.2d 74, 40 Cal.Rptr. 58, 61 (2d Dist. 1964) (same); *People* v. *Clouard*, 196 Cal. App.2d 669, 16 Cal. Rptr. 772, 776 (2d Dist. 1961) (same). Indeed, the very purpose of enacting an omnibus theft statute, the California Supreme Court has declared, is to eliminate the need for the jury to consider "the technical differences between the several types of theft" it subsumes. *People* v. *Ashley*, 42 Cal.2d 246, 258, 267 P.2d 271, 279, *cert. denied*, 348 U.S. 900 (1954).

It is also noteworthy that none of the cases relied on by appellant involved either motor vehicles or a simultaneous charge under Cal. Vehicle Code § 10851, which, by its terms, authorizes conviction even if the defendant intended only a temporary retention of an automobile. To the contrary, because of the substantial overlap between Penal Code § 484 (theft) and Vehicle Code § 10851, California courts in motor vehicle cases are especially careful to instruct the jury that grand theft, in all its forms, requires an intent to deprive the owner of permanent possession. *See, e.g.*, *People* v. *Pater*, *supra*. *See also*, *People* v. *Carr*, *supra*; *People* v. *Jeffries*, 47 Cal. App.2d

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[5] *See also People* v. *Jaso*, 4 Cal. App.3d 767, 771, 84 Cal. Rptr. 567, 570 (2d Dist. 1970) ("That the intent to permanently deprive an owner of his property is a necessary requisite of the crime of theft cannot be doubted.")

801, 119 P.2d 190, 194 (1941). The reason for this apparently uniform approach is well illustrated by the circumstances of this case. Under the interpretation advanced by the State, the criminal complaint filed against appellant—which charged both grand theft and a violation of Vehicle Code § 10851—would be entirely duplicative. If the prosecution could secure a conviction for embezzlement upon proof of an intent to keep the car "temporarily," the elements of the two offenses become functionally identical, a consequence that could not have been intended by the legislature.

In sum, appellee can only defend the rationality of Vehicle Code § 10855 by challenging the lower courts' interpretation of state substantive law. In order to meet that argument, it is sufficient merely to invoke this Court's oft-repeated admonition that it is not "free . . . to overturn [a] state court's conclusions of state law." *Hicks ex rel. Feiock* v. *Feiock*, *supra*, 108 S.Ct. at 1428. In light of the uncertain state of California law, the clarity of the instructions to appellant's jury, and appellee's failure to challenge that interpretation in any prior state proceeding, this case presents no occasion for deviating from that elemental rule.[6]

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[6] *Amicus* defends the rationality of § 10855 on the grounds that it is not a presumption at all since there is a perfect "identity" between the predicate fact—willful retention of the car—and the ultimate fact—intent to embezzle. The argument is incorrect on its face. There is, of course, a big difference between deliberately keeping a car beyond the due date and specifically intending a fraudulent conversion. Moreover, even if there were an "identity" between willful retention and intent, the argument is unavailing since the predicate facts set out in § 10855 generate a presumption with respect to *every* element of the offense.

III. THE CONCEDED VIOLATION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Assuming, without conceding, that the acknowledged constitutional violation is even subject to harmless-error analysis, appellant does not oppose the State's request that the issue be remanded to the court below.[7] Given the current unavailability of the trial transcript, however, we continue to believe that the considerations of economy that ordinarily commend a remand on harmless-error issues are absent in this case.[8] Although the Court exercises its power to conduct a harmless-error inquiry only "sparingly," the unique circumstances of this case warrant an exception to that general rule. *Rose* v. *Clark*, 478 U.S. 570, 584 (1986).

If the Court does elect to address the issue, the conclusion that the acknowledged error was "harmful" is all

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[7] Appellee contends that *Rose* v. *Clark* definitively determined that any instruction containing an impermissible presumption is subject to harmless-error analysis. By its terms, *Rose* only dealt with mandatory *rebuttable* presumptions and, as we explain in our opening brief, its reasoning extends no further. Moreover, appellee's contention proves too much. Surely, for example, an instruction that directed the jury to presume guilt from the return of the indictment could never be found harmless. Although less extreme, the presumptions at issue in this case are no less conclusive and, therefore, warrant the same analysis. *See* Opening Br. at 35-38.

[8] The State now apparently takes the position that: (1) there is at least some possibility that the trial transcript would be recovered and; (2) it might have some bearing on the outcome of the harmless-error question. Br. at 35 & 35 n.34. The suggestion is quite remarkable in light of the State's prior position on these issues in response to appellant's longstanding efforts to obtain the transcript. We acknowledge, however, that the possibility of the recovery of the transcript, however remote, argues in favor of remand. We assume that by the time of argument, appellee will be able to inform the Court more fully of the status of the transcript.

but inescapable on this record. As the last-minute inquiry from the jury confirms, the State's proof that appellant had specifically intended to deprive the owner of *permanent* possession was highly equivocal. Given that the evidence on that crucial element was anything but "dispositive" and given the substantial indications that the jury was able to reach its verdict only by relying on the impermissible presumptions, appellee cannot begin to carry its burden of proving that the error was harmless beyond a reasonable doubt. *See* Opening Br. at 35-41.

To the extent the State addresses these issues at all, its response is wholly unpersuasive. As we understand it, appellee's only contention is that, contrary to the trial court's understanding of California law, the jury could have found appellant guilty of grand theft even without proof of an intent to deprive the owner of permanent possession. In short, like its position on the merits, appellee's harmless-error analysis is premised on the view that the lower courts' construction of state law was incorrect and is now subject to challenge in this Court. As we explain in detail above, that suggestion is untenable in the circumstances of this case. For purposes of this Court's review, the law of California is the law that was presented, without objection, to appellant's jury and sustained on appeal by the Appellate Department. Against that controlling legal framework, appellee does not, and cannot, contend that the error was harmless.

Moreover, even if it were somehow open to appellee to suggest that the lower courts misapplied state law, the result would be the same. Harmless-error analysis requires the reviewing court to determine whether, even excluding the impact of the violation, it can conclude beyond a reasonable doubt that the "verdict would have been the same." *Pope* v. *Illinois*, 481 U.S. 497, 503 n.6

(1987). That inquiry necessarily requires a careful weighing of the record-evidence to determine the degree to which it supports the jury's verdict on the crime actually charged. It does not, however, authorize the reviewing court to find the defendant guilty of another offense, even if it concludes that the evidence would support such a verdict. Surely, a court, having found an error in a murder instruction, could not hold that the defendant was in any event guilty of assault. For precisely the same reason, the State's suggestion that appellant was guilty of a lesser crime than that set out in the trial court's charge is entirely beside the point. Appellant's jury was explicitly and repeatedly instructed that grand theft requires a specific intent to deprive the owner of permanent possession, and, as evidenced by its query, its verdict clearly reflected that definition of the crime.[9] The only pertinent question, therefore, is whether—independent of the impermissible presumptions—*that* verdict is so overwhelmingly supported by the evidence that "no rational jury" could fail to reach it. *Rose* v. *Clark*, *supra*, 478 U.S. at 580-81. Because that question can only be answered in the negative, the judgment below should be reversed.

[9] We note in this regard that appellant was acquitted of the charge under Vehicle Code § 10851—a statute that *does* authorize conviction even if the defendant intended only a temporary deprivation.

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Department of the Superior Court of California, County of Los Angeles should be reversed.

Respectfully submitted,

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